his election to treat the original contract as at an end, *Goodman* v. *Pocock* (1850) 15 Q. B. 576, and, if he elects to sue in general assumpsit, he must return all benefits received under the original contract. *Miner* v. *Bradley* (Mass. 1839) 22 Pick. 457. Hence it follows that, when a vendee enforces his lien, he thereby repudiates the contract of sale, and his position in regard to such contract is the same whether or not he asks for a rescission thereof. If, moreover, the lien is conferred to protect a quasi-contractual right, it is immaterial whether that right is based on fraud or failure of consideration. It has frequently been held that where a married woman refuses to complete title, the vendee has a lien, although the contract was void *ab initio, Pilcher v. Smith* (Tenn. 1858) 2 Head. 208; *Pierson v. Lum* (1874) 25 N. J. Eq. 390; but see *Ewing* v. *Osbaldiston* (1837) 2 M. & C. 53, and other courts have not hesitated to declare a lien in cases similar to the principal case. *Davis* v. *Heard* (1870) 44 Miss. 50; *Cooper* v. *Merritt* (1875) 30 Ark. 686; and see *Mycock* v. *Beatson* (1879) L. R. 13 Ch. Div. 384. The result reached by the dissenting opinion accords with the better reasoning and, as well, with the spirit underlying equitable relief.

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THE RULE IN SHELLEY'S CASE APPLIED TO PERSONALTY.—The Supreme Court of Delaware has recently refused to extend the operation of the rule in Shelley's Case, as many courts profess to have done, to gifts of personal property, on the ground that the extension would be against both reason and authority. *Jones* v. *Rees* (Del. 1908) 69 Atl. 785. The latter proposition, with few exceptions outside of Delaware, is doubtful; the former seems not to have been closely examined by the courts.

The rule in Shelley's Case, as an inflexible rule of property applicable to the attempted creation of estates under a certain form of words, 7 COLUMBIA LAW REVIEW 550, was doubtless originally a protective rule of feudal tenure to eliminate one of the many means devised to defraud the lord of the incidents of seigniory. *Van Grutten* v. *Foxwell* [1897] L. R. App. Cas. 658. Hence there is no historical reason for its application to personalty. Moreover, to have a gift of chattels such that the rule might operate strictly by way of analogy, would require that the words "to A for life, remainder to his administrators, executors and assigns," be used, not "remainder to his heirs." *Bennett* v. *Bennett* (1905) 217 Ill. 434. Yet it is always the latter case that arises. There was no technical rule at common law that the word "heirs" might not be used in disposing personalty as a word of purchase, *Powell* v. *Boggis* (1866) 35 Beav. 535, and no intimation appears in the earliest cases that the rule in Shelley's Case obtains in gifts of personalty. Thus, not only the word "issue" in a devise of a term for life, afterward to his issue, *Warman* v. *Seaman* (1676) Rep. Temp. Finch 279, but even the words "heirs of the body," which should have brought the bequest literally within the rule, were considered words of purchase. *Peacock* v. *Spooner* (1688, 90) 2 Vern. 43, 195. The question was purely one of the testator's intent. On the one hand, a devise of a term to a wife and after her death to the heirs of her body, was held to give an absolute estate to the wife, on the ground that the testator intended a gift to the wife in tail, "which could not be" in personalty. *Bray* v.

*Buffield* (1677) 2 Ch. Cas. 236. Similarly, in *Richards* v. *Bergavenny* (1694) 2 Vern. 324, a similar intention was found from the fact that the personalty was meant to go with realty given in tail. On the other hand, an assignment of a long term in trust for A for ninety-nine years, if he lived so long, then to his wife for life, remainder to the heirs of A begotten on his wife, did not go absolutely to the first taker, the creation of the short term out of the long one sufficiently showing the donor's intent not to assign the entire term to A. *Ward* v. *Bradley* (1687) 2 Vern. 24. The succeeding interval was broken only by *Dafforne* v. *Goodman* (1699) 2 Vern. 362, expressly following *Peacock v. Spooner, supra.*

Apparently, the first recorded instance of the application to personalty of the rule in Shelley's Case is *Webb* v. *Webb* (1710) 1 P. W. 132. Lord Harcourt decided that an assignment of a term in trust to A for life, remainder to his right heirs, with intervening remainders, vested the entire term in A, saying, "I never heard it said before *Peacock* v. *Spooner,* that the limitations of a term in equity differ from the case of a freehold at common law." The gift in this, as in the earlier cases, was of a chattel real, but the step was soon taken from chattels real to chattels personal. *Butterfield* v. *Butterfield* (1748) 1 Ves. 133, 155; *Garth* v. *Baldwin* (1755) 2 Ves. 646. Notwithstanding, it had been previously held by Lord Harwicke, who decided *Garth* v. *Baldwin, supra,* that the words "heirs of the body" could be words of purchase when such an intention appeared elsewhere. *Hodgeson v. Bussey* (1740) 2 Atk. 80; *accord, Hockley v. Mowbry* (1790) 3 B. C. C. 81; cf. *Knight* v. *Ellis* (1789) 2 B. C. C. 570.

At most, therefore, in England the rule in Shelley's Case as applied to personalty is a rule of construction, easily yielding to the apparent intention of the testator or donor. This, the strongest supporters of the rule in the United States readily admit, *Glover* v. *Condell* (1896) 163 Ill. 566; *Key's Estate* (1896) 4 Pa. Dist. 124; *Taylor* v. *Lindsay* (1888) 14 R. I. 518, only one being driven to protest along with such admission "that not to apply the rule to personalty is to prostrate one of the great landmarks of property." *Horne* v. *Lyeth* (Md. 1818) 4 Harr. & J. 431. This result may be attributed in part to the fact that to make the rule inflexible would more often defeat the intention of the testator than in the case of realty, a consequence which equity strains to avoid. *Knight* v. *Ellis, supra.* Indeed, most cases cited in support of the rule merely sustain the principle that personalty cannot be entailed. *Gross* v. *Sheeler* (Del. 1885) 7 Houst. 280. In England, the cases in point seem limited to instances where the words would create an entail in realty. The words in the bequest are construed in terms of realty, and then, if by the operation of the rule in Shelley's Case, an estate tail would have been created, the absolute interest in the personalty is given. In the United States its operation has been extended to words that would create a fee simple in realty. Cf. *Horne* v. *Lyeth, supra.* Peculiarly enough, in at least one state, the rule is still applied to personalty though the words would not vest the remainder in the ancestor in a case of realty because of the abrogation of the rule by statute. *Powell* v. *Brandon* (1852) 24 Miss. 343; cf. *Sands* v. *Trust Co.* (1907) 195 Mass. 575. A further difficulty encountered in the American cases arises where the courts failed to distinguish between a

proper application of the rule in Shelley's Case to discover an entail, and an analogous application of the rule against perpetuities where personalty is given over after the death of the first legatee without issue. Both rules have been indiscriminately termed the rule in Shelley's Case. *Glover v. Condell, supra; Mason* v. *Pate's Ex'r* (1859) 34 Ala. 379.

The decision of the Delaware court is commendable. It is not to be wondered that eminent judges have been puzzled to discern by what process the intention of a donor of personalty must be defeated by the operation of a rule which acts upon a remainder to the "heirs" of one who takes an estate of freehold, because of the technical meaning of that word when applied to real property. *Herrick v. Franklin* (1868) L. R. 6 Eq. 593; *Smith* v. *Butcher* (1878) L. R. 10 Ch. D. 113. It is curious, also, that courts of equity should have felt bound to follow, at least to an extent, an arbitrary rule of real property at common law, when sustaining interests in chattels unknown to the common law.

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PROPER USES OF A HIGHWAY WHERE THE FEE IS IN THE ABUTTING OWNER.—The conflict between the common law, on the one hand, and the needs of a developed commercial society, on the other, has produced considerable confusion in the determination of the proper uses to which a highway may be put, where the fee is in the abutting owner. Undoubtedly, at common law, the right obtained by the public from the abutting owner was merely a right to pass and repass. 1 Ro. Abr. 392, B, 1, 2; *Goodlittle* v. *Alkar* (1757) 1 Burr. 133, 143. Apparently, this still remains the rule in England, *Goodson* v. *Richardson* (1874) L. R. 9 Ch. App. 221; *Galbreath* v. *Armour* (1845) 4 Bell. App. Cas. 374, where there is no need of modification since a new burden may be imposed by Parliament. The Massachusetts courts early succumbed to the demand for new highway uses. *City of Boston* v. *Richardson* (1866) 13 Allen 146, 159-161. It is said that the abutting owner dedicated the highway for all uses adding to the public convenience and for all purposes of intercommunication. *Pierce* v. *Drew* (1883) 136 Mass. 75; *Sears* v. *Croker* (1904) 94 Mass. 586. This doctrine has been followed in other jurisdictions, *Cater* v. *N. W. etc. Tel. Co.* (1895) 60 Minn. 539; *Briggs* v. *Lewiston etc. R.R.* (1887) 96 Me. 363; *People* v. *Eaton* (1894) 100 Mich. 208, but has not met with general favor. Elliott, Roads & Streets (2nd Ed.) 764-5. Two criticisms may be suggested: first, that it amounts to an implication in law of an intention in the dedicator which doubtless had no existence in fact; second, that the logical application of the rule deprives the abutter of all enjoyment of the fee. These courts, however, forced to admit that a consistent application would produce hardship, have been compelled to modify it to the extent of holding that a steam railroad is an additional burden on the fee. *Carli* v. *Stillwater* (1881) 28 Minn. 373.

A majority of courts, however, have sought a more equal balance of the conflicting interests. The cases may be separated into two classes: first, those in which it is attempted to devote the highway to new forms of travel; second, those in which it is sought to establish new uses not connected with passing and repassing. New York, as illustrated by a recent decision,